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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Wireless Telecommunications Bureau Requests)
Comment on the Construction Requirements)
for Commercial Wide-Area 800 MHz)
Licensees Pursuant to *Fresno Mobile*)
Radio, Inc. v. FCC)

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FEDERAL COMMUNICATIONS COMMISSION
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To: Chief, Wireless Telecommunications Bureau

REPLY COMMENTS OF CHADMOORE WIRELESS GROUP, INC.

1. Chadmoore Wireless Group, Inc. ("Chadmoore") hereby submits these reply comments supporting those commenters who assert that the Federal Communications Commission ("Commission" or "FCC") must afford 800 MHz Specialized Mobile Radio ("SMR") commercial licensees that are part of a wide area system ("Wide-Area Licensees") the same relaxed buildout requirements it afforded to Economic Area 800 MHz Licensees ("EA Licensees") which obtained their SMR licenses by auction.

**The Commission Must Afford Wide-Area Licensees the Same Buildout Relief
Afforded to EA Licensees to Ensure Regulatory Parity Among CMRS Competitors**

2. Chadmoore supports the comments filed by Southern Company ("Southern"), particularly Southern's argument that population-based construction coverage requirements¹ must be afforded to Wide-Area Licensees just as they are afforded to all other commercial mobile radio service ("CMRS") providers in order to ensure that some competitors are not put at a competitive disadvantage as a direct result of differing regulatory treatment.

¹ Population-based construction coverage requirements would require a Wide-Area Licensee to provide coverage to one third of the population of its coverage area within three years and two-thirds of the population within five years. See, Southern Comments at 11.

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3. Chadmoore also agrees with Nextel's comments to the extent that Nextel supports establishing the same buildout relief for Wide-Area Licensees and EA Licenses in order to provide regulatory parity among CMRS players. However, Chadmoore opposes Nextel's proposal that the Commission define Wide-Area Licensees or "wide area SMRs" as "those licensees with extended implementation authority as granted by the Commission in its SMR extended implementation rejustification orders."² The Commission must apply the same rules to all wide area CMRS operators, and cannot exclude those operators who did not obtain rejustification authority from the Commission.³ As outlined in Chadmoore's comments in this proceeding, rejustification authority would have been unnecessary if Wide-Area Licensees had been treated with regulatory parity and allowed to provide service to one third of the population of their service areas from the beginning.

The Coverage Areas Afforded Relaxed Construction Requirements
Must be Based on a Wide-Area Licensee's Individually Licensed Sites

4. The Commission must define the geographic areas covered by an extended construction period as the interference contours of the Wide-Area Licensee's individually licensed sites.⁴ This definition will ensure that Wide-Area Licensees are on a level playing field with other

² Nextel Comments at note 2. *Siting Order*, 13 FCC Record 1533 (1997), *recon.*, 12 FCC Rcd 18,349 (1997) (hereinafter collectively "*Rejustification Order*").

³ The FCC must also apply the same regulations on those Wide Area Licensees who have converted from CMRS to PMRS because these licensees should have received the same relaxed construction deadlines that EA-Licensees received when they originally received their original authorizations. The fact that these facilities were subsequently converted to PMRS is irrelevant to the fact that they should have received the same regulatory treatment as other CMRS operators from the start.

⁴ Southern Comments at p. 11.

CMRS operators. Chadmoore opposes Nextel's proposal that the Commission define these geographic areas as "the areas covered by their wide-area grants as rejustified by the Commission in its 1997 *Rejustification Order*."⁵ Rather, the definition of a licensee's geographic area should be the interference contours of its individually licensed sites as proposed by Southern.⁶ If the Commission had not treated Wide-Area Licensees and EA Licensees in a disparate manner, the *Rejustification Order* would have been unnecessary and no licenses would have been canceled as a result. As a result of the *Rejustification Order*, many licensees, including Russ Miller and the Roberts Group were seriously aggrieved because they were improperly denied rejustification authority and their licenses were summarily canceled.⁷ The Commission cannot once again treat CMRS operators differently by arbitrarily defining services areas based on its *Rejustification Order*. In fact, the Commission should reinstate those licenses that were improperly canceled as a result of the FCC's initial imposition of disparate construction requirements. The Commission cannot limit the coverage area subject to relaxed buildout requirements to those areas that received

⁵ Nextel Comments at p. 9.

⁶ Southern Comments at p. 11.

⁷ See Chadmoore Comments at ¶ 5. The Roberts Group was denied rejustification authority because it had not constructed its facilities even though its first construction deadline under its extended implementation authority had not yet occurred. In addition, the comments filed by William R. Miller DBA Russ Miller Rental demonstrate further the inequities resulting from the Commission's *Rejustification Order*.

rejustification authorization.⁸ The geographic area covered by the relaxed construction requirements must be based on the Wide-Area Licensee's individually authorized sites.

All CMRS Operators Must Be Subject to the Same Regulatory Treatment

5. Mobile Relays, Inc. ("Mobile Relays") believes the Commission should treat licensees converting and upgrading existing analog SMR systems differently than it treats licensees utilizing new frequencies to provide service where no service had been provided before,⁹ and the Commission should distinguish between the 800 MHz SMR Pool channels and the 800 MHz Business and Industrial/Land Transportation Pools ("B/LT").¹⁰ Mobile Relays' argument directly contradicts Section 332 of the Act which clearly states that all CMRS operators must be subject to the same regulatory treatment as other CMRS operators.¹¹ The Commission cannot grant SMR operators currently providing service to customers relaxed construction requirements and not afford SMR operators constructing new systems, the same relaxed construction requirements any

⁸ As the court ruled in *Fresno*, the Commission has treated similarly situated licensees differently without justification. See, *Fresno Mobile Radio, Inc., et al., v. Federal Communications Commission and United States of America; Nextel Communications, Inc., Intervenor*, 165 F.3d 965, 969 (D.C.Cir. 1999). By limiting the coverage areas afforded extended time to construct to the areas covered by grants of rejustification authority, the Commission would once again be treating similarly situated licensees disparately without justification.

⁹ Mobile Relays Comments at p. 3.

¹⁰ *Id.* at p. 2.

¹¹ See Chadmoore Comments at ¶ 7, citing to 47 U.S.C. § 332(c), Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312 (1993) and *Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, Third Report and Order, 9 FCC Rcd 7988 at ¶ 22 (1994).

more than it can give relaxed construction deadlines to EA Licensees and not to Wide-Area Licensees. As stated by the Commission, "Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment."¹² The fact that it may or may not be more difficult and/or time consuming for an SMR licensee to convert and upgrade an existing system loaded with customers than for an SMR licensee to construct a new system is irrelevant. All CMRS Wide-Area Licensees, including licensees proposing new systems and 800 MHz B/LT Licensees, must be afforded the same regulatory treatment, including the same relaxed construction deadlines. It is not necessary, nor statutorily permitted, for the Commission to afford any of these license groups relaxed buildout deadlines to the exclusion of the others.

A Wide-Area Licensee Must Demonstrate that Service Is Being Provided
to Customers by One of the Frequencies Licensed as Part of Its System

6. Chadmoore supports Southern's suggestion that the Commission require Wide-Area Licensees to demonstrate that they are providing service to a particular area by constructing one of the channels licensed to that area. In this way, licensees will have the flexibility to construct their systems in accordance with market demand in a manner similar to other CMRS operators.¹³ As stated by Southern, *market forces should compel investment in construction, not regulation*.¹⁴ The Commission must stop disparate regulation and allow equal competitive opportunities to shape

¹² CMRS Third Report and Order at ¶ 22, citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Further Notice of Proposed Rulemaking, 9 FCC Rcd 2826 at ¶ 13 (1994) ("*Further Notice*").

¹³ Southern Comments at p. 4.

¹⁴ *Id.* at p. 9 (emphasis added).

the CMRS industry. While Mobile Relays states that the Commission should require that Wide-Area Licensees demonstrate service is being provided to customers on at least two of the licensed frequencies, it provides no justification for this suggestion. Licensees must be allowed to determine whether market demand in a particular area justifies constructing additional frequencies for that area. If the demand is there, and a licensee wants to be successful in a competitive environment, it will build additional channels as demand dictates. It is neither cost effective nor in the public interest for the Commission to require licensees, operating in a competitive environment, to build excess facilities before the customer base develops.


Conclusion

7. The U.S. Court of Appeals stated in *Fresno* that the FCC must treat all similarly situated licensees equally. Accordingly, the FCC Must reinstate all licenses that were canceled under the *Rejustification Order* due to the Commission's disparate treatment. In addition, the Commission must afford Wide-Area Licensees the same relaxed buildout requirements it afforded to EA Licensees which obtained their SMR licenses by auction. In addition, the Commission should define the coverage area covered by the extended construction period as the interference contours of the Wide-Area Licensee's individually licensed sites and demonstrate that service is being provided to customers in a particular coverage area on at least one of the frequencies

licensed as part of its system. These requirements will ensure that Wide-Area Licensees are treated the same as EA Licensees.

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July 30, 1999

CERTIFICATE OF SERVICE

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